INTERIOR BOARD OF INDIAN APPEALS

Alturas Indian Rancheria v. Pacific Regional Director, Bureau of Indian Affairs

54 IBIA 138 (11/09/2011)

Related Board cases:

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# United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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| ALTURAS INDIAN RANCHERIA, Appellant, | ) | Order Vacating Decision |
| v. | ) | Docket No. IBIA 12-002 |
| PACIFIC REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee. | ) | November 9, 2011 |

On September 12, 2011, the Board of Indian Appeals (Board) received an appeal from the Alturas Indian Rancheria (Tribe or Appellant), through the Rose Faction, seeking review of an August 19, 2011, letter (Decision) of the Pacific Regional Director (Regional Director), Bureau of Indian Affairs (BIA).[1] The Regional Director issued the Decision after the Board vacated an earlier decision by the Regional Director to accept a proposal from the Rose Faction for renewing the Tribe's Indian Self-Determination and Education Assistance Act (ISDA) contract to fund government operations. *See Alturas Indian Rancheria v. Acting Pacific Regional Director*, 54 IBIA 1 (2011).

The Decision recognized the 2008 Business Committee of the Tribe (2008 Business Committee) "on an interim basis for government-to-government purposes, including the administration of [an ISDA] contract renewal request that comports with regulatory requirements." Decision at (unnumbered) 3. But the Decision did not appear to be taking any action on an ISDA contract renewal request — e.g., by approving a proposal that BIA had found to be in compliance with regulatory requirements — nor did it identify some

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[1] This appeal involves a tribal government dispute involving two factions. The Rose Faction consists of Darren Rose, Jennifer Chrisman, and Joseph Burrell. The Del Rosa Faction consists of Phillip Del Rosa, Wendy Del Rosa, Calvin Phelps, and Donald Packingham. The tribal membership of Phelps and Packingham is disputed.

The Board's identification of the Alturas Indian Rancheria as the appellant shall not be construed as expressing any view on the merits of the underlying dispute or on the authority of the Rose Faction to file the appeal on behalf of the Tribe.

other required Federal action that necessitated BIA's interim recognition decision and justified issuance of the Decision. Because of this apparent absence of any justification for the Regional Director to have issued the Decision when she did, the Board ordered the Regional Director to show cause why the Decision should not be summarily vacated. The Board provided the Regional Director with an opportunity to submit a specific ISDA contract renewal proposal upon which she had acted in conjunction with her issuance of the Decision, or to identify what other BIA action necessitated her Decision.

Upon consideration of the Regional Director's response, and pleadings filed by the two tribal factions, we vacate the Decision because the Regional Director failed to identify any BIA action that was or needed to be taken that required her to issue the Decision. In the absence of necessary Federal action by BIA on a specific matter, a BIA decision to recognize tribal officials, at least in the midst of a tribal government dispute, constitutes improper interference in internal tribal matters, as the Regional Director herself has recognized on other occasions.

**Background**

The background on the underlying tribal dispute is recounted in *Alturas*, *see* 54 IBIA at 4-8, and need only be summarized here. Relevant to the present appeal, in *Alturas* — an appeal by the Del Rosa Faction — the Board vacated a decision by the Regional Director that simultaneously accepted an ISDA contract renewal proposal from the Rose Faction (which controls the last undisputed General Council of the Tribe) and recognized on an interim basis, for government-to-government purposes, the 2008 Business Committee, which is the last undisputed Business Committee of the Tribe (and which is controlled by the Del Rosa Faction).[2] The Board concluded that, independent of the tribal dispute, the Rose Faction's ISDA contract proposal was facially deficient and did not satisfy a regulatory requirement. The Board also concluded that the Regional Director's decision in that case was internally inconsistent because it apparently purported to recognize two dueling tribal entities for government-to-government purposes, without reconciling or adequately explaining that apparent dual recognition. *See id.* at 13.

Two weeks after the Board decided *Alturas*, the Regional Director issued the Decision now before the Board. In this latest decision, the Regional Director recognized

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[2] As noted in *Alturas*, both the General Council and the Business Committee have broad authorities under the Tribe's Constitution. *See* 54 IBIA at 4-5.

on an interim basis the 2008 Business Committee for government-to-government purposes, "including the administration of [an ISDA] contract renewal request *that comports with regulatory requirements*." Decision at (unnumbered) 3 (emphasis added). As noted earlier, on its face the Decision did not appear to be taking any action on, or to have been issued in conjunction with taking action on, a pending ISDA contract proposal or other required Federal action. Instead, it appeared that the Decision anticipated that an ISDA contract proposal would be submitted at some time in the future.[3] In the absence of any apparent justification for the Regional Director to have issued the Decision, the Board ordered the Regional Director to show cause why the Decision should not be summarily vacated.[4]

In its OSC, the Board noted that if, in fact, the Regional Director had issued the Decision in the absence of taking any specific and required Federal action, then issuance of the Decision would appear to be contrary to both Board precedent and the Regional Director's own practice at other times. *See* OSC at 2, citing *Del Rosa v. Acting Pacific Regional Director*, 51 IBIA 317, 318 (2010) (Regional Director vacated a decision by the BIA Northern California Agency Superintendent because there was no pending matter requiring Federal action for purposes of the government-to-government relationship; in the absence of any required Federal action, there was no justification for the Superintendent to have made a decision on the tribal membership dispute); *see also George v. Eastern Regional Director*, 49 IBIA 164, 186-87 (2009) (a BIA decision concerning a tribal dispute must be premised on the need for some Federal action); *Wasson v. Western Regional Director*, 42 IBIA 141, 153-54 (2006) (same).

In response, the Regional Director argues that Federal court litigation concerning Appellant's ISDA renewal request remains pending, and that the "impetus" for her Decision

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[3] The Del Rosa Faction apparently had the same understanding as did the Board. *See* Del Rosa Faction's Motion to Place Pacific Regional Director's August 19, 2011 Decision into Immediate Effect Pursuant to 25 C.F.R. § 2.6, at 4 ("once the Tribe's leadership is determined, the [Superintendent] will be able to approve *a properly submitted [ISDA] contract proposal*") (emphasis added).

Of course if, upon consideration of an ISDA contract renewal proposal, BIA were to conclude that the proposal is deficient, separate and apart from any issues concerning the tribal leadership dispute, BIA could reject or disapprove the proposal without unnecessarily interjecting itself into the tribal dispute.

[4] *See* Pre-Docketing Notice, Order for Regional Director to Clarify or Show Cause, and Order Denying Motion to Place Decision into Immediate Effect (Sept. 16, 2011) (OSC).

"continues to be the appeal of the Superintendent's decision" in 2010 to return ISDA proposals from both factions. Regional Director's Response at 2. The Regional Director also contends that "there is cause for the Decision because the Federal litigation is stayed pending a final determination [by] the Department [of the Interior (Department)] regarding who governs the Tribe for purposes of government-to-government relations, including the contract award." *Id*. at 2-3. The Regional Director did not, in response to the OSC, submit an ISDA contract renewal proposal or otherwise identify any other BIA action that had necessitated the Decision when it was issued. On November 4, 2011, however, the Board received from the Regional Director a "Notice of Pending Contract Request," informing the Board that on September 6, 2011 — *after* her Decision — the Del Rosa Faction had submitted an ISDA contract renewal proposal *to the Superintendent*.

The Del Rosa Faction filed a response in opposition to vacatur of the Decision. Appellant filed a response supporting vacatur. Subsequently, Appellant also filed a request for the Board to refer this appeal to the Assistant Secretary - Indian Affairs (Assistant Secretary) on the grounds that the Decision involved an exercise of discretion, or alternatively for the Board to "retroactively postpone the effect" of our *Alturas* decision and stay further proceedings pending judicial review of *Alturas*. *See* Letter from Steven J. Bloxham, Esq., to Board, Oct. 27, 2011 (Appellant's Oct. 27 Letter), at 2.[5] And on November 7, 2011, the 2008 Business Committee, through the Del Rosa Faction, filed a motion to dismiss the appeal on the grounds that the Board lacks jurisdiction over enrollment disputes and over matters committed to BIA's discretion, that the Regional Director's decision was not a final and appealable decision, and that Appellant failed to perfect its appeal by filing a statement of reasons within the time period prescribed in BIA's appeal regulations.[6] We first address the responses to our OSC and conclude that the

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[5] On October 24, 2011, Appellant filed a complaint in Federal district court seeking review of our decision in *Alturas*. *See Alturas Indian Rancheria v. United States Department of the Interior*, No. 1:11-cv-01867 (D.D.C.). Appellant also has other litigation that is pending against the Department concerning the ISDA contract proposal that Appellant submitted in 2010 and which the Superintendent returned to the Tribe. *See Alturas Indian Rancheria v. Salazar*, No. 2:10-cv-01997-LKK-EFB (E.D. Cal.).

[6] The 2008 Business Committee's motion is filed in the name of the Tribe (as is this appeal, filed by the Rose Faction), but to avoid confusion, the Board will refer to it as a motion of the 2008 Business Committee or of the Del Rosa Faction.

Decision must be vacated, which grants Appellant relief that in most respects renders moot its additional requests. But to the extent it does not, we then address Appellant's requests, none of which we find has merit. We also deny as without merit the Del Rosa Faction's motion to dismiss.[7]

## Discussion

### I. Regional Director's Decision

As we understand the Regional Director's argument in response to the OSC, the Rose Faction's litigation in the Eastern District of California, *see supra* note 5, and the proceedings leading up to the Board's decision in *Alturas*, provide the impetus and a justification for the Regional Director to have issued a recognition decision, independent of taking any Federal action pursuant to or as required by statute or regulation. In effect, the Regional Director contends that these circumstances provided grounds to suspend the principle that some action must be pending before and required of BIA before BIA may wade into a tribal dispute. We disagree with the Regional Director.

First, with respect to the pending Federal litigation, we note that the plaintiff in that litigation — Appellant in this appeal — agrees with the Board that its litigation does not provide some independent requirement or justification for the Regional Director to have issued a recognition decision when she did. Second, as Appellant correctly points out, the Regional Director's attempted reliance on the earlier *appeal* from the Superintendent's action returning both factions' ISDA proposals in 2010, as prompting a requirement that she issue the Decision, is misplaced because, as the Board observed in *Alturas*, see 54 IBIA at 6, neither faction appealed to the Regional Director from that action by the

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[7] On October 17, 2011, the Board also received, *ex parte*, a copy of an October 12, 2011, letter from Phillip Del Rosa to the Regional Director, which included a copy of an e-mail regarding the Del Rosa Faction's September 6, 2011, ISDA contract renewal request. The documents were sent in an envelope from the Rosette, LLP law firm in Chandler, Arizona, unaccompanied by any explanation. *Ex parte* communications to the Board are prohibited. *See* 43 C.F.R. § 4.27(b). Given our disposition of this appeal, we find it unnecessary to consider this submission or to solicit comment, *see id.*, on this improper *ex parte* submission.

Superintendent. *See* Appellant's Reply to BIA Response at 2.[8] Finally, and more importantly, the Decision does not purport to be taking action on one of those past proposals, and the Regional Director — having been afforded an opportunity to clarify — does not contend that it does. Instead, the Decision specifically anticipates further review of some unspecified future ISDA proposal to determine whether it comports with regulatory requirements.[9] And by now submitting to the Board an ISDA contract proposal that arrived only *after* the Decision, and upon which no action has been taken (or could be taken, given the fact that this appeal divested BIA of jurisdiction), the Regional Director has effectively conceded the facts that establish that she put the cart before the horse.

In response to the OSC, the Del Rosa Faction argues that because other Federal and State agencies rely, for their own dealings with the Tribe, on a BIA decision to recognize certain individuals within a tribe for government-to-government purposes, it necessarily follows that BIA has authority, and perhaps even a duty, to issue such a recognition decision even if there is no justification for doing so for BIA purposes. We disagree. The Del Rosa Faction fails to identify any rule, regulation, or statute that vests BIA with freestanding authority or a duty to issue a tribal recognition decision in the absence of BIA's own need to engage in government-to-government business with a tribe. When BIA action is required, e.g., action on an otherwise sufficient ISDA proposal, BIA may not cause a

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[8] Of course, as we noted in *Alturas,* the factions' failures to appeal from the Superintendent's action returning their respective ISDA proposals did not preclude the Regional Director from taking action on the Rose Faction's proposal *sua sponte* and incorporating that action in a decision in the Del Rosa Faction's appeal from the Superintendent's decision. But for the Regional Director to suggest that the earlier appeal to her from the Superintendent's decision required her, on remand, to issue a recognition decision, is in error.

[9] To the extent that the Decision might be construed as impliedly disapproving the Rose Faction's ISDA contract proposal that was at issue in *Alturas*, by deciding that BIA does not recognize the last undisputed General Council as the Tribe's representative, for government-to-government purposes, we would still summarily vacate the Decision because in *Alturas* we held that the Rose Faction's ISDA proposal was defective under the regulations, in addition to vacating the Regional Director's apparent recognition of both factions in the same decision. Unless and until the deficiency is cured and the proposal resubmitted to BIA — which no party contends has occurred — there would be no reason or justification for the Regional Director to take further action on that proposal, and certainly no justification to purportedly "disapprove" it through a decision to recognize the 2008 Business Committee.

hiatus in the delivery of services to tribal members by withholding a recognition decision and declining to take the required action. *See Goodface v. Grassrope*, 708 F.2d 335, 338-39 (8th Cir. 1983). But where no Federal action is required of BIA, any hiatus in tribal services that are dependent upon relationships with other agencies, organizations, or businesses, is a matter between the Tribe and those other entities. Where the Tribe has a need to interact with agencies and organizations other than BIA, it is the responsibility of those third parties — based on any rules, regulations, policies, or statutes that may apply to them — either to determine for themselves with whom they will interact in dealings with the Tribe or, alternatively, to wait until such time as BIA, another entity, or the Tribe itself, makes a determination upon which those third parties choose to rely.[10]

The Board is well aware of the longstanding nature of the present tribal dispute and the related litigation. As the Regional Director notes, extensive administrative resources have been devoted to addressing this dispute. *See* Regional Director's Response at 1. But however eager BIA may have been to address the tribal dispute, principles of tribal sovereignty and the Federal policy disfavoring Federal interference in tribal matters still trump momentary expediency and required that BIA wait until BIA action was actually required before injecting itself into the dispute.[11] Unfortunately, by prematurely issuing a recognition decision, additional administrative resources have again unnecessarily been expended, and the dispute has been prolonged even more. Be that as it may, the Board concludes that the Decision must be vacated, and reiterates that any recognition decision by BIA must be linked to and accompanied by some specific Federal action that is required for government-to-government purposes. In the interim, and notwithstanding the Del Rosa Faction's post-decisional submission of an ISDA proposal to BIA, the Board strongly encourages the factions, and their counsel, to resolve the dispute in a mutually agreeable and acceptable manner.

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[10] It is, of course, within the full control of the Tribe to deal with governments or businesses through interim arrangements to which both factions may agree in order to ensure that critical functions of the Tribe continue.

[11] Appellant contends that the factions effectively did submit the dispute to a mutually acceptable forum, the U.S. Postal Service, which decided the dispute in Appellant's favor. We express no opinion on the preclusive effect, if any, of that decision, particularly given our disposition of this appeal.

## II. Appellant's Requests for Referral of this Appeal to the Assistant Secretary, to Retroactively Postpone the Effectiveness of *Alturas*, and to Stay Further Proceedings Pending Judicial Review of *Alturas*

Although Appellant filed a pleading in support of vacatur of the Decision, Appellant subsequently submitted to the Board a letter requesting that the Board refer this appeal to the Assistant Secretary because "the subject matter of the [D]ecision, to a certain extent, involved matters committed to the discretion of BIA," and therefore "the applicable regulations direct the Board either to dismiss the appeal or to refer the matter to the Assistant Secretary[] pursuant to 43 C.F.R. § 4.337(b)." Appellant's Oct. 27 Letter at 2. We deny Appellant's request, rejecting its suggestion that the Decision was "committed to" the discretion of BIA, *see* 43 C.F.R. § 4.337(b), such that it is unreviewable by the Board and must be referred to the Assistant Secretary. Where, as is the case here, there is well-established precedent and a standard against which BIA's exercise of discretion may be reviewed, the Board has jurisdiction to consider an appeal, and a referral of the appeal to the Assistant Secretary is not required. Moreover, the Board's disposition of the appeal grants Appellant complete relief by vacating the Decision that adversely affected Appellant, which renders moot any need to consider whether a particular issue or issues should be referred to the Assistant Secretary.[12]

We also deny Appellant's request that the Board "retroactively postpone the effect" of *Alturas* pending judicial review. Our decision in *Alturas* became effective upon issuance by the Board. *See* 43 C.F.R. § 4.312 ("Unless otherwise stated in the decision, rulings by the Board are final for the Department and must be given immediate effect."). To the extent that Appellant's request might be construed as seeking reconsideration and reopening of that decision, even if for the limited purpose of "postponing the effect," Appellant's request would be untimely and we would lack jurisdiction to consider it. *See* 43 C.F.R. § 4.315 (a petition for reconsideration must be filed within 30 days from the date of the Board's decision). Appellant's reliance on *Estate of Sharon Lee Bennett*, 26 IBIA 279 (1994), is misplaced. In that case, the Board had stayed a *pending* appeal to await the outcome of judicial review of an earlier Board decision. The Board did not purport to "retroactively postpone the effect" of the earlier Board decision that was the subject of judicial review.

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[12] We are uncertain why Appellant also suggests dismissal of the appeal as an appropriate alternative, given the fact that dismissal would provide Appellant with no relief and would allow the Decision to become effective.

III. Del Rosa Faction's Motion to Dismiss

On November 7, 2011, the Del Rosa Faction filed a motion to dismiss this appeal, arguing that (1) the Board lacks jurisdiction over enrollment disputes; (2) the Decision to recognize the 2008 Business Committee on an interim basis was not a final, and thus appealable, decision by the Regional Director; (3) the Decision was an exercise of discretion that is committed to BIA and is unreviewable by the Board; and (4) Appellant failed to perfect its appeal because it failed to file a statement of reasons within 30 days pursuant to 25 C.F.R. § 2.10(c). The Del Rosa Faction concludes its "statement of issues" by asserting that the 2008 Business Committee is eligible to enter into an ISDA contract with BIA and to receive Revenue Sharing Trust Fund (RSTF) monies from the State of California. *See* Interested Parties' Memorandum in Support of Motion to Dismiss at 3. We deny the Del Rosa Faction's motion to dismiss.

First, the Decision does not purport to decide an enrollment dispute, nor is it premised on a finding of who is or is not a member of the Tribe, and thus the Del Rosa Faction's argument that the Board's lack of jurisdiction over enrollment disputes deprives us of jurisdiction over this appeal fails.

Second, although it might be argued that the Decision was not final and appealable under 43 C.F.R. § 4.331, we think the better view is that it was final and appealable action within the meaning of § 4.331, considering the specific facts of this case and in light of the practical consequences that each faction attaches to the Decision. The Del Rosa Faction incorrectly equates an "interim" recognition decision with non-final and non-appealable BIA action. The fact that the Regional Director's Decision purports to be "interim" (i.e., limited in duration) does not mean that it was not intended to affect or to determine the rights of the parties, with finality, within that interim period and within the meaning of § 4.331. Indeed, the Del Rosa Faction's argument makes clear that it wants to have the Decision treated as legally affecting the rights of the parties (i.e., by fixing the right of the 2008 Business Committee, as opposed to Appellant, to contract with BIA, and to receive RSTF monies), while remaining beyond a right of appeal to the Board. *See* Interested Parties' Memorandum in Support of Motion to Dismiss at 1-2, 8.[13]

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[13] The Del Rosa Faction relies on the Board's decision in *Picayune Rancheria v. Acting Pacific Regional Director*, 48 IBIA 241 (2009), in which the Board dismissed as interlocutory an appeal from certain instructions provided by the Regional Director regarding the preparation of an environmental impact statement. But in *Picayune*, the

(continued...)

Third, we have already rejected Appellant's argument that the Decision was an exercise of discretion that was so wholly committed to BIA that we lack jurisdiction, and we similarly reject the Del Rosa Faction's argument. *See id.* at 3 (characterizing Decision as a "political discretionary decision"). There is clear law to apply to our review of the Decision in this case: BIA is not permitted to interject itself in a tribal dispute apart from taking some necessary action that requires BIA to decide with whom to engage for government-to-government purposes.[14]

Fourth, the Del Rosa Faction's argument that the appeal should be dismissed because Appellant failed to comply with 25 C.F.R. § 2.10(c) is misplaced. The Board has more specific regulations that govern appeals to the Board, which allow for separate briefing by the parties, in addition to what must be included in a notice of appeal. *See* 43 C.F.R. § 4.311. And the Board has not held that an appellant's failure to include a statement of reasons in a notice of appeal, *see id*. § 4.332(a)(2), constitutes grounds for summary dismissal. Even under BIA's appeal regulations, an appellant must be given an opportunity to amend the appeal documents before summary dismissal is appropriate for failure to state the reasons for an appeal. *See* 25 C.F.R. § 2.17(b).

And finally, the Del Rosa Faction's assertion that the 2008 Business Committee is "eligible" to contract with BIA, *see* Interested Parties' Memorandum in Support of Motion to Dismiss at 3, simply mirrors the Regional Director's error by putting the cart before the horse. Unless or until BIA receives a proposal that is in compliance with the regulatory requirements for an ISDA contract renewal, the "eligibility" of one faction or the other remains an abstract proposition, not ripe for review. And whether the 2008 Business Committee is "eligible" to receive RSTF monies is a matter for the State of California to determine, regardless of what decision BIA ultimately may reach regarding a contract renewal request. Thus, we deny the Del Rosa Faction's motion to dismiss the appeal.

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[13](...continued)
Regional Director's instructions, while constituting an "action," did not have any immediate or concrete adverse effect on the appellant. Here, in contrast, the Del Rosa Faction's argument clearly is premised on evading Board review (by having the Decision deemed non-final and non-appealable) while simultaneously having the Decision treated as having some legal effect on an "interim" basis. *See id.* at 8.

[14] Even when a BIA decision involves an exercise of discretion, the Board has found that it has jurisdiction to determine whether BIA adequately explained its exercise of discretion, although the Board will not substitute its judgment for that of BIA.

## Conclusion

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Board vacates the Decision.[15]

I concur:

// original signed
Steven K. Linscheid
Chief Administrative Judge

// original signed
Debora G. Luther
Administrative Judge

[15] Our disposition of this appeal returns jurisdiction to BIA to consider the Del Rosa Faction's recent ISDA submission or any other ISDA proposal or matter that requires BIA action. Assuming that BIA action on one or more proposals requires a recognition decision, BIA should fully explain its rationale and address, to the fullest extent necessary, arguments made by the tribal factions regarding their respective claims of entitlement to recognition, whether on an interim basis or as the current representative(s) of the Tribe.

Our decision also renders moot any questions, *see* Appellant's Oct. 27 Letter at 2, about whether this appeal divested BIA or the Assistant Secretary's office of jurisdiction to consider a request from the Rose Faction for a Secretarial election by eligible voters to decide whether to amend the Tribe's Constitution.